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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA,
and
LAWRENCE W. I'ANSON,
in his personal and official capacity as
Chief Justice of The Supreme Court of Virginia,

Appellants,

—v.—

CONSUMERS UNION OF THE
UNITED STATES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, *AMICI CURIAE*

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-198

THE SUPREME COURT OF VIRGINIA
and
LAWRENCE W. I'ANSON,
in his personal and official capacity as Chief Justice of the Supreme Court of Virginia,

Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., et al.,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, AMICI CURIAE

Interest of Amici*

For 60 years, the American Civil Liberties Union and its state affiliates,

* The parties have agreed to the filing of this brief. Letters of consent will be filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

including amicus ACLU of Virginia, have been dedicated to the protection of the Constitutional and statutory rights of the American people.

The present case is of particular interest to the ACLU and the ACLU of Virginia because the decision of the three-judge District Court is essential to the vitality of one such statutory right -- the right to receive fee awards in civil rights cases. Although the significance of this decision to public interest organizations such as ours, whose cases often involve actions brought pursuant to the civil rights acts, is clear, the decision, if reversed, would undermine Congress' intent to provide all private citizens with the means necessary to vindicate the important public policies underlying these civil rights laws. In recognition of the impact decisions involving attorney fee awards may have upon potential plaintiffs' willingness and ability to litigate civil rights cases, the ACLU and the New York Civil Liberties Union participated, amici curiae, in Hutto v. Finney, 438 U.S. 678 (1978), urging the validity of an award of fees against a state agency.

Amici similarly seek to participate here to urge this Court to resolve the issues presented in light of Congress' broad remedial purpose to provide persons whose rights have been violated and who cannot afford legal counsel with "effective access to the judicial process where their grievances can be resolved according to law." H.R. No. 94-1558 Cong., 2d Sess., p.1.

STATEMENT OF THE CASE

Amici herein adopt the statement of the case presented in the brief of appellee, Consumers Union of America, Inc.

SUMMARY OF ARGUMENT

Amici contend that the award of attorneys' fees and costs granted to appellees incident to a grant of prospective relief is not subject to doctrines of immunity and was therefore proper.

Doctrines of governmental immunity have traditionally sought to protect either certain governmental actions from all judicial review or to protect certain defendants from retrospective judicial

remedies. Point I. Thus, some attempts to secure retrospective compensatory relief for damages caused by allegedly unlawful governmental action have been barred by doctrines of immunity. However, there is no issue of retrospective relief in this case. Accordingly, in the circumstances of this case, no question of immunity is raised. Moreover, awards made directly against governmental entities, as here, avoid the dangers which the doctrines of immunity have sought to prevent, i.e., the possible unfairness of holding an official personally liable and the potential "chill" a holding may have on that official and others in the future performance of their duties. Point II.

Amici further contend that the Virginia legislature's delegation to the Virginia Supreme Court of the responsibility for supervising the professional and ethical standards of practicing attorneys did not entitle that court to a claim of legislative immunity. And because the Virginia Supreme Court was acting in an administrative capacity as agent of the state (and thus, was not bound by such judicial norms

as stare decisis, adversarial proceedings, or appeals), appellants are not entitled to judicial immunity. Point III.

Finally, amici argue that 42 U.S.C. §1988 was intended by Congress to supersede common law immunities, and to authorize federal judges to allocate the expenses of a successful application for prospective constitutional relief.

I. THE DISTRICT COURT'S DECISION TO REIMBURSE A SUCCESSFUL PLAINTIFF FOR FEES AND EXPENSES NECESSARILY INCURRED IN ESTABLISHING THE PROSPECTIVE UNCONSTITUTIONALITY OF A GOVERNMENT REGULATION IS NOT SUBJECT TO DOCTRINES OF IMMUNITY.

Historically, immunity doctrines[1/] have played two roles in our legal system. First, broad "jurisdictional" immunity has served to remove the merits of certain governmental actions from all judicial scrutiny; second, narrower "remedial" immunity has acted to shield certain defendants from retrospective judicial remedies while reserving to the courts prospective power to review the merits of the acts in question.[2/]

1/ This Court has recognized five categories of immunity: Sovereign immunity and Eleventh Amendment immunity insulate entities, while executive, legislative, and judicial immunities protect individual defendants.

2/ The bright-line distinction between prospective and retrospective relief drawn by this Court in the context of Eleventh Amendment immunity is a classic example of remedial immunity. Compare Ex Parte Young, 209 U.S. 123 (1908) and Quern v. Jordan, 440 U.S. 332 (1979). Similar distinctions between prospective and retrospective relief exist in the areas of prosecutorial and judicial immunity. Compare Doran v.

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Given Chief Justice Marshall's rationale in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the drastic concept of jurisdictional immunity has played a very limited role in our constitutional jurisprudence.[3/] Under

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Salem Inn, Inc., 422 U.S. 922 (1975) (recognizing prosecution immunity) with Imbler v. Pachtman, 424 U.S. 409 (1976) (recognizing immunity from damage claim) and Gerstein v. Pugh, 420 U.S. 103 (1975) and Mitchum v. Foster, 407 U.S. 225 (1972) (granting injunctive relief) with Stump v. Sparkman, 435 U.S. 349 (1978) (recognizing immunity from damage claim).

3/ The leading and, perhaps, sole modern example of jurisdictional immunity is the absolute exemption from judicial review accorded certain preparatory acts taken by legislators in furtherance of core legislative duties: United States v. Helstoski, 61 L.Ed.2d 12 (1979) (speeches on floor of Congress cannot be subject of any judicial scrutiny). See also, Tenney v. Brandhove, 341 U.S. 367 (1959). Of course, even under legislative immunity, the finished legislative product becomes subject to judicial review. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This Court has recently noted that even when legislative immunity insulates individual legislators from judicial review, relief may be sought directly against the appropriate governmental entity so long as no entity immunity exists. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 59 L.Ed.2d 401 (1979).

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a series of rubrics, each of the doctrines of immunity nevertheless permits prospective judicial review of the constitutionality of challenged governmental action.[4/] Since the

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Moreover, even the preparatory stages of legislation become subject to a measure of judicial review if the legislature seeks to enforce its demands by contempt citations. E.g., Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); United States v. Reynolds, 345 U.S. 1 (1953). Cf. Groppi v. Leslie, 404 U.S. 496 (1972); or seeks to bar qualified legislators from participating in the legislative process. Powell v. McCormack, 395 U.S. 486 (1969); Bond v. Floyd, 385 U.S. 116 (1966). Finally, this Court's cautious approach to the scope of a legislator's core legislative function has further circumscribed the application of legislative immunity. Hutchinson v. Proxmire, 61 L.Ed.2d 411 (1979); Doe v. McMillan, 412 U.S. 306 (1973).

4/ The characteristic judicial approach to unconstitutional questions in the context of immunity doctrines has been the invocaction of a process which reasons that action in excess of constitutional limits is ultra vires and, thus, not entitled to immunity. The question of immunity is, thus, made coterminous with the merits of the constitutional issue. Celebrated examples of this Court's recognition that action in excess of constitutional merits is outside the scope of immunity include Ex Parte Young, 209 U.S. 123

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ban on lawyer advertising administered by the Supreme Court of Virginia was alleged (correctly) to violate the First Amendment, no serious question exists concerning the power and duty of a Marbury court to have considered the merits and to have issued a narrow prohibitory injunction against the continued enforcement of an unconstitutional regulation. E.g., Ex Parte Young, 209 U.S. 123 (1908).[5/]

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(1908); United States v. Lee, 106 U.S. 171 (1882); Butz v. Economou, 438 U.S. 478 (1978); and Ex Parte Virginia, 100 U.S. 339 (1880). In the absence of a constitutional claim, broad jurisdictional immunity appears to continue to bar all judicial review of sizeable areas of sub-constitutional governmental action. E.g., Kendall v. Stokes, 3 How. 87 (1845); Wilkes v. Dinsman, 7 How. 89 (1849); Barr v. Matteo, 360 U.S. 564 (1959); Dalehite v. United States, 346 U.S. 15 (1953). Whether an inherent justification exists for such a broad exemption from judicial review is an open question.

5/ This Court has repeatedly entertained cases seeking prospective relief against allegedly unconstitutional prosecutorial or judicial action. E.g., Gerstein v. Pugh, 420 U.S. 103 (1975); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975). See also Ex-Parte Virginia, 100 U.S. 339 (1879); Mitchum

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Although "jurisdictional" immunity has played little or no role in constitutional litigation, its less dramatic counterpart, "remedial" immunity, has been invoked to shield individual governmental officials

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v. Foster, 407 U.S. 225 (1972). For examples of prohibitory injunctions against unconstitutional judicial action issued by the lower federal courts, see, e.g., Long v. Powell, 388 F. Supp. 422 (D. Ga. 1975); Quadra v. Superior Court, 375 F. Supp. 605 (N.D. Cal. 1974); Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Phillips v. Cole, 298 F. Supp. 1049 (N.D. Miss. 1968); Bramlett v. Peterson, 307 F. Supp. 1311, 1321-22 (M.D. Fla. 1969); Koen v. Long, 302 F. Supp. 1383 (E.D. Mo. 1969); Alsager v. Polk County Juvenile Court, 406 F. Supp. (D. Iowa 1975). The authorities are canvassed in Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972) rev'd on other grounds, sub nom., O'Shea v. Littleton, 414 U.S. 488 (1974). Unlike the broad mandatory injunction vacated in O'Shea, the court below issued a narrow prohibitory order. Finally, injunctions aimed at unconstitutional judicial conduct will often raise federalism concerns expressed in Younger v. Harris, 401 U.S. 37 (1971) and its progeny, as well as issues of the propriety of equitable relief given the usual availability of adequate remedies at law. However, neither a Younger issue nor an issue as to the propriety of equitable relief is present in this case.

from the retroactive consequences of judicial review whenever necessary to encourage the vigorous exercise of sensitive governmental functions. E.g., Stump v. Sparkman, 435 U.S. 359 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 13 Wall. 335 (1872) (absolute judicial immunity from compensatory damages); Edelman v. Jordan, 415 U.S. 651 (1974); Quern v. Jordan, 440 U.S. 332 (1979) (absolute Eleventh Amendment immunity from compensatory damages); Imbler v. Pachtman, 424 U.S. 409 (1976) (absolute prosecutorial immunity from compensatory damages); Scheuer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 420 U.S. 308 (1975); Butz v. Economou, 438 U.S. 478 (1978) (qualified executive immunity from compensatory damages).[6/] Remedial immunity cases invariably involve attempts to secure

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6/ The concept of a qualified immunity based on good faith and reasonable action shades imperceptibly into that of the good faith defense. Apart from possible pleading on burden of proof issues, no difference appears to exist between the qualified immunity described in Scheuer and Butz, supra, and the good faith defense described in Pierson v. Ray and Wood v. Strickland, supra. Thus, as Mr. Justice Rehnquist suggested in dissent in Butz, it is probably more correct to describe executive immunity as having been abolished in favor of a flexible good faith defense.

retrospective compensatory relief for damages caused by an allegedly unlawful governmental act. Where, as in this case, no issue of a retrospective damage award is present, no basis exists for the invocation of remedial immunity. Since the award of attorneys' fees and costs at issue herein is merely a Congressionally authorized allocation of the expenses of reaching a prospective decision on the regulation's constitutionality, it does not trigger the application of remedial immunity.

Congress, in enacting 42 U.S.C. §1988, has determined that disputes involving constitutional rights are so important (and so unlikely to be adequately financed) that the necessary economic costs of providing legal and factual data to a judge may be allocated to an unsuccessful government defendant. Such an allocation of the necessary expenses of resolving disputes concerning the prospective constitutionality of governmental action is a far cry from the imposition of retrospective compensatory damages. See generally, Hutto v. Finney, 437 U.S. 678 (1978). Unlike the imposition of compensatory damages, no blame placing is involved in an award of attorneys' fees pursuant to 42 U.S.C.

§1988. Rather, such an award merely reflects a considered Congressional judgment as to the proper allocation of the inevitable expenses of determining the prospective constitutionality of a challenged governmental act.7/

This Court has repeatedly noted that the decision to allocate the economic costs of an action, including attorneys' fees, does not raise issues of remedial immunity. E.g., Hutto v. Finney, 437 U.S. 678 (1978); Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927). See also, Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd mem., 409 U.S. 942 (1972); Hadnott v. Amos, 394 U.S. 358 (1969).

7/ Unlike an award of compensatory relief, which is a classic loss-shifting remedy, an award of attorneys' fees under 42 U.S.C. §1988 is a cost-spreading device which allocates the cost of producing a benefit to the benefitted group. Thus, a litigant who obtains prospective relief against unconstitutional activity confers a significant benefit upon the community, justifying a decision to allocate the cost of producing the benefit to a government defendant capable of spreading it across the benefitted group. See, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Hall v. Cole, 412 U.S. 1 (1913). Cost spreading, unlike loss-shifting, does not trigger remedial immunity.

In Hutto, this Court ruled that Congress, in enacting 42 U.S.C. §1988, had authorized an award of attorneys' fees against the Arkansas Department of Corrections, notwithstanding Arkansas' claim of Eleventh Amendment immunity. In response to Arkansas' claim that its Eleventh Amendment immunity could not be overridden in the absence of explicit congressional language,[8/] Mr. Justice Stevens, writing for the Court, noted the distinction between retroactive liability for pre-litigation conduct (requiring explicit language) and the attempt to allocate expenses necessarily incurred in litigation seeking prospective relief (which does not require explicit language). Mr. Justice Stevens noted:

> Unlike ordinary 'retroactive' relief such as damages or restitution, an award of costs does not compensate the plaintiff for the injury that first brought him into court. Instead, the award reimburses him for a portion of the expenses he incurred in seeking prospective relief.

8/ This Court held in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that Congress, pursuant to Section 5 of the Fourteenth Amendment, was empowered to supersede Eleventh Amendment immunity by legislation. The legislation in Fitzpatrick explicitly established state liability. No such explicit language exists in 42 U.S.C. §1988.

> (An award of costs will almost invariably be incidental to an award of prospective relief, for costs [and attorneys' fees under 42 U.S.C. §1988] are generally awarded only to prevailing parties, see Fed Rule Civ Proc 54(d), and only prospective relief can be successfully pursued by an individual in a suit against a State [or a judge])." 437 U.S. at 695 n.24.

Just as attorneys' fees may be assessed against a state incident to the grant of prospective relief without violating principles of remedial immunity established by Edelman v. Jordan, 415 U.S. 651 (1974), so may attorneys' fees be assessed against a court incident to the grant of prospective relief without violating principles of remedial immunity established by Stump v. Sparkman, 435 U.S. 349 (1979), especially where, as here, the fees are to be paid by the State of Virginia.[9/] Similarly, in

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9/ The District Court carefully tailored its award to run only against the Supreme Court of Virginia and the Chief Justice in his official capacity. Thus, as in Hutto, ultimate payment will be made by the state. Given the fact that no individual liability is contemplated, personal immunities, judicial or legislative, are not implicated at all. Rather, this case would appear to be governed solely by the entity immunity rules set forth in Hutto v. Finney, supra.

Fairmont Creamery, this Court assessed costs (including a statutory award of attorneys' fees) against Minnesota, despite a claim of sovereign immunity.

Finally, in both Sims v. Amos, 340 F. Supp. 691 (M.D. Ala. 1972), aff'd mem. 409 U.S. 942 (1972) and in Hadnott v. Amos, 394 U.S. 358 (1969), this Court approved fee awards to counsel engaged in prospective constitutional litigation despite the existence of legislative and judicial defendants with claims to traditional remedial immunity.[10/]

Properly viewed, therefore, no conflict exists between remedial immunity, which grants protection against retroactive damage awards, and fee awards incident to a grant of prospective relief against unconstitutional activity. Just as remedial immunity is designed to encourage vigorous public action, an award of fees to successful constitutional

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The inapplicability of personal immunity doctrines to awards payable by governmental entities is discussed infra at Point II.

10/ In a related context, this Court has recognized that, so long as the judicial remedy involved is prospective, the existence of economic consequences incident to the grant of prospective relief does not violate principles of remedial immunity. E.g., Quern v. Jordan, 440 U.S. 332 (1979); Milliken v. Bradley, 433 U.S. 267, 293 (1977) (Powell, J.).

litigants is designed to encourage a vigorous private counterpoise to public action. It is the coexistence of retroactive immunity and prospective fee awards which maintains the healthy tension between robust individualism and energetic government that characterizes a functioning democratic state.

II. NEITHER JUDICIAL NOR LEGISLATIVE IMMUNITY BARS AWARDS PROPERLY RENDERED AGAINST A GOVERNMENTAL ENTITY

The curious history of personal immunities enjoyed by certain favored categories of official defendants has passed through several steps.

Confronted initially with the existence of sovereign immunity as a bar to judicial review of allegedly unlawful government action,[11/] British courts evolved a mechanism for asserting a measure of control over agents of the Crown. Reasoning that an official of the Crown who acted in excess of his legal authority was not, in fact, clothed with the authority of the sovereign, British courts treated such an official as a private tortfeasor, ineligible for sovereign immunity.

11/ For the historical origins of sovereign immunity and the evolution of judicial techniques for dealing with it, see Ehrlich, Proceedings Against the Crown (1216-1377) in 6 Oxford Studies in Social and Legal History (Vinogradoff ed. 1921). Professor Jaffe suggests that judicial response to sovereign immunity can be divided into two categories: (1) an expansive development of the writ of right and (2) the evolution of the notion that an official acting beyond the scope of his lawful authority is ultra vives and, hence, not an agent of the sovereign. Jaffe, Suits Against Government and Officers: Sovereign Immunity, 77 Harv.L.Rev. 1 (1963).

Thus, in both Ashby v. White, 6 Mod. 45, 87 Eng. Rep. 808 (Q.B. 1702), rev'd, 1 Brown P.C. 45, 1 Eng.Rep. 417 (H.L. 1703) and Entick v. Carrington, 2 Wils 275, 95 Eng. Rep. 807 (K.B. 1976), agents of the Crown were deemed to have forfeited sovereign immunity by acting outside the scope of their lawful authority. Since it was often difficult, if not impossible, for an agent of the Crown to know the precise scope of his lawful authority, official defendants were placed in the unenviable position of risking substantial economic liability in carrying out instructions subsequently found to have been unlawful.

In America, where an official's authorization (and his immunity) was dependent upon both the legality of his orders and the constitutional power to issue them, an official defendant's plight became doubly difficult. Thus, an official, acting pursuant to direct orders, forfeited his sovereign immunity if a court subsequently found that the orders were beyond the constitutional power of the issuer. Such an official, stripped of sovereign immunity, was personally liable to an injured plaintiff. E.g., Little v. Barreme, 2 Cranch 170 (1804). Moreover, although sporadic indemnification of officials who had acted pursuant to

invalid orders took place, no generally accepted notion of a "good faith defense" existed to shield such officials from potentially devastating liability.[12/] In order to shield officials performing sensitive public functions from the danger of post hoc strict liability for having committed an "unauthorized" official act, courts evolved the notion of personal immunity. Such a personal immunity came to exempt judges, legislators, and ranking executives from the legal fiction established by Ashby v. White and Entick v. Carrington to circumvent sovereign immunity.[13/] However, the creation of personal immunities as a counterbalance to the legal fiction created by Ashby v. White and Entick v. Carrington posed an unacceptable choice between no recovery for an injured plaintiff or strict

12/ It was not until Butz v. Economou, 438 U.S. 478 (1978), that the principle of a good faith defense for federal officials charged with having committed unconstitutional acts was explicitly recognized by this Court. 438 U.S. at 507 n.34.

13/ For the evolution of judicial immunity, see Floyd v. Barker, 12 Co.Rep. 23, 77 Eng. Rep. 1305 (Star Chamber 1607); Case of the Marshalsea, 10 C.Rep. 68b, 77 Eng.Rep. 1027 (C.P. 1613); Terry v. Huntington, 145 Eng. Rep. 557 (Ex. 1669); Yates v. Lansing, 5 Johns R. 282, 290 (N.Y. 1810) (Kent, C.J.); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872).

liability for an innocent official. Such a dichotomy was inherently unstable and, predictably, modern law has evolved at both of the extremes.

First, modern cases have recognized that a government official who acts with a good faith, reasonable belief that his acts are "lawful" ("authorized," in the language of the early cases) should not be personally liable for compensatory damages. E.g. Pierson v. Ray, 386 U.S. 547 (1967); Wood v. Strickland, 420 U.S. 308 (1975). Second, modern courts have tended to expand the ability of a plaintiff to secure relief directly against the government without the necessity of fashioning a fictitious immunity circle designed to separate officials from the sovereign. E.g., United States v. Lee, 106 U.S. 196 (1882); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). See also, Monell v. New York State Department of Social Services, 436 U.S. 658 (1978). But see Quern v. Jordan, 440 U.S. 332 (1979). For developments in the state courts, see, e.g., Brown v. Commonwealth, 453 Pa. 566, 305 A.2d 868 (1973); Ayala v. Philadelphia Board of Public Education, 453 Pa. 584, 305 A.2d 877 (1973). A.L.I. Restatement (2d) of the Law of Torts, §895B at 23, 24 (Comment A) (Tent. Draft

Nov. 19, 1973). See Muskopf v. Corning Hospital Dist., 55 Cal.2d 24, 359 P2d 457 (1961).

Thus, this Court has already recognized in Scheuer v. Rhodes, 416 U.S. 232 (1974), and Butz v. Economou, 438 U.S. 478 (1978), that the emergence of a fully developed good faith defense has rendered the absolute personal immunity of ranking executive officials unnecessary and, hence, obsolete. In Stump v. Sparkman, 435 U.S. 359 (1978), however, this Court declined a simliar invitation to supplant absolute judicial immunity with a good faith defense. And amici recognize that were the award herein to impose retrospective liability individually upon members of the judiciary, it would run afoul of judicial immunity.[14/] However, in fashioning its decree, the District Court took advantage of the second response to the dilemma posed by personal immunities as a counterpoise to an immunity circle--the increased availability of direct governmental

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14/ In Point I amici have argued that an award of costs and fees incident to a grant of prospective relief against unconstitutional judicial action does not trigger a remedial immunity. Under such an analysis, costs and fees could be assessed against individual judges, subject only to the discretion conferred by 42 U.S.C. §1988.

liability.[15/] The District Court avoided the twin dangers of personal unfairness and chilling effect which underlie the initial recognition of judicial immunity by tailoring an award payable not by individual judges but by the State of Virginia. In Hutto v. Finney, 437 U.S. 678 (1978), both Mr. Justice Stevens for the majority and Mr. Justice Rehnquist in dissent noted that an award of attorneys' fees payable by the State of Arkansas would not chill individual prison officials in the performance of their duties. 437 U.S. at 700 n.32. (Stevens, J.); 437 U.S. at 717 (Rehnquist, J., dissenting). Similarly, an award of fees payable by the State of Virginia would not chill the Justices of the Supreme Court of Virginia in the performance of their duties any more than the routine award of costs in Fairmont Creamery "chilled" Minnesota officials in

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15/ Ordinarily, an award against the State of Virginia would be barred by sovereign immunity embodied in the Eleventh Amendment. However, in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), this Court ruled that Congress was empowered to waive a state's Eleventh Amendment immunity. In Hutto v. Finney, 437 U.S. 678 (1978), this Court ruled that Congress, in enacting 42 U.S.C. §1988, had overridden the Eleventh Amendment immunity in the context of costs and fees. Eleventh Amendment immunity continues, however, in the context of retrospective awards on the merits. Quern v. Jordan, 440 U.S. 332 (1979).

that case. Once it becomes possible to pierce the veil of sovereign immunity, resort to fictitious immunity circles and personal immunities becomes unnecessary. In such cases, a direct award against the sovereign permits full compensation without the risks of personal unfairness and chilling effect which forced the courts to invent personal immunities in the first place.

If there had been no sovereign immunity, British courts would not have been obliged to invent the legal fiction of strict liability for ultra vires official action to avoid it. If such a legal fiction had not threatened unfairness and sluggish government, our courts would not have been obliged to invent personal immunity as a counterpoise to it. The manifest unfairness threatened by personal immunity has now obliged courts to consider supplanting it with a good faith defense or, even more significantly, doing away with the artificial ban on governmental liability which set us on this circular path in the first place. Thus, amici suggest that when, as here, legal theory has progressed to the point where a given award is payable by a governmental entity, no basis exists to frustrate the award by misplaced reliance on personal immunity which exists solely as a consequence

of an historic inability to recover against the sovereign.[16/]

16/ Similar but not identical issues are raised in deciding whether an entity may claim a derivative good faith defense. See generally, Owen v. City of Independence, No. 78-1779, cert. granted, 48 U.S.L.W. 3189 (Oct. 1, 1979); Sala v. County of Suffolk, No. 79- , petition for writ of certiorari pending. Whatever the resolution of the question of whether an entity-defendant is entitled to claim a derivative good faith defense, no basis exists for a claim of derivative personal immunity. In a derivative good faith defense context, the issue of whether the government should be liable without fault is presented. In a derivative personal immunity setting, a government official has acted culpably. The sole issue is whether, despite culpable action, the government may escape liability merely because the individual defendant is exempt from suit.

III. THE ADMINISTRATION OF AN UNCONSTITUTIONAL DISCIPLINARY REGULATION IS ENTITLED TO NEITHER JUDICIAL NOR LEGISLATIVE IMMUNITY.

The Virginia legislature has delegated to the Supreme Court of Virginia the responsibility for supervising the professional and ethical standards of attorneys practicing in that state. In vesting broad regulatory authority over the legal profession in the Virginia Supreme Court, the Virginia legislature followed a familiar pattern pursuant to which a legislature delegates to a qualified administrative body the responsibility for monitoring significant areas of our economic and political life. Thus, for example, teachers are regulated by boards of education; doctors by medical boards; engineers by technical groups; and the securities industry by the Securities and Exchange Commission.[17/] In choosing the Supreme Court of Virginia as its nominee to monitor lawyers, the Virginia legislature simply chose one from

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17/ Obviously, the list of regulatory agencies and regulated activities is virtually endless.

among a number of possible regulatory bodies, staffed potentially by judges, laymen, and/or lawyers. Surely, the "immunity" of such a regulatory body cannot turn on whether it is staffed by judges or by non-judges. The actions of the Supreme Court of Virginia in executing its administrative responsibilities are not rendered "judicial" merely because they are executed by robed officials. Rather, as this Court has carefully defined, judicial immunity is a functional rather than a personal privilege. Thus, in Butz v. Economou, 438 U.S. 478 (1978), this Court did not hesitate to vest executive officials performing adjudicatory functions with an absolute judicial immunity. Conversely, in Stump v. Sparkman, 435 U.S. 349 (1978), this Court noted that judges were entitled to claim judicial immunity solely for "judicial" acts.[18/] It is,

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18/ This Court has followed a similarly strict functional view of the scope of legislative immunity. E.g. Gravel v. United States, 408 U.S. 606 (1972); Doe v. McMillan, 412 U.S. 306 (1973); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975); Hutchinson v. Proxmire, 61 L.Ed.2d 411.

amici suggest, not a judicial act to administer a general regulatory scheme indistinguishable in principle from the vast body of administrative regulations routinely subjected to broad judicial review.

As Mr. Justice White noted in Stump v. Sparkman, this Court has never considered the necessary attributes of a "judicial" act for immunity purposes. However, in Butz, in determining that administrative law judges should be vested with absolute judicial immunity, the Court held:

> [T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process and correctibility of error on appeal are just a few of the many checks on malicious action by judges. 438 U.S. at 512.

None of the factors enumerated in Butz as justifying judicial immunity is present in the Supreme Court of Virginia's administration of lawyer disciplinary regulations.

First, the issue of lawyer advertising is an issue of political significance, pitting, as it does, segments of the bar against each other. In administrative regulations governing lawyer advertising, the Virginia Supreme Court is subject to precisely the "political" (in the non-pejorative sense) influences which are brought to bear on any administrative body called upon to resolve disputes between interest groups in a given industry. Second, as a regulatory body, the Virginia Supreme Court is free to discard past rules and regulations as unwise without regard to the principles of stare decisis which govern its judicial deliberations. Indeed, it is the flexibility of a decision-maker not bound by precedent which characterizes the administrative process. Third, no pretense of an adversary process exists in the deliberations of the Virginia Supreme Court over the disciplinary regulations at issue herein, and no possibility of appeal exists within the Virginia judiciary. Accordingly, if one applies the Butz criteria to the administrative activities performed by the

Virginia court, those activities cannot qualify as a judicial act.[19/]

Nor can the Supreme Court of Virginia claim legislative immunity. This Court has carefully traced the evolution of legislative immunity as a device to shield legislators from judicial interference in the performance of core legislative functions. E.g. United States v. Helstoski, 61 L.Ed.2d 12 (1979).[20/] However, this Court

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19/ Although this Court has not explicitly passed upon the nature of a judicial act for immunity purposes, it has repeatedly distinguished between judicial acts and administrative acts performed by judges. E.g. Roudesush v. Hartke, 495 U.S. 15 (1972); United States v. Ferreira, 54 U.S. (13 How.) 40 (1851). Lower courts have consistently declined to provide judicial immunity to non-judicial acts. E.g. Ktsames v. Underwood, 552 F.2d 740 (7th Cir. 1977); Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970).

20/ Since legislative immunity is designed to permit legislators maximum freedom of action in carrying out their legislative responsibilities, this Court has applied it both retrospectively and prospectively. Compare, Tenney v. Brandhove, 341 U.S. 367 (1951) with Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

has never suggested that legislative immunity shields administrative officials engaged in the traditional rule-making process. If a Virginia regulatory body is entitled to legislative immunity in connection with the promulgation of rules and regulations governing lawyers, a similar immunity attaches to every administrative body in the land.[21/] Moreover, the District Court's decree in no way interfered with the rule-making process. Instead, the District Court sought to act merely upon the finished product by enjoining its prospective enforcement. Not even the most vigorous proponent of legislative immunity would argue that judicial review of the prospective constitutionality of a statute is precluded. E.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Since the Virginia Court acts

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21/ If legislative immunity applies to the administrative rule-making process, litigants would be powerless to seek judicial review of unconstitutional information demands and would be barred from challenging the procedural regularity of the rule-making process. Cf. Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975).

as a prosecutor under its own rules, the District Court's decision did nothing more than enjoin a prosecutor from enforcing an unconstitutional disciplinary rule. E.g. Ex Parte Young, 209 U.S. 123 (1908). Where a body both promulgates a rule and enforces it, the body can hardly claim legislative immunity from an order to refrain from enforcing the rule as unconstitutional. Cf. Kilbourn v. Thompson, 103 U.S. 168 (1881).[22/]

22/ Petitioners' legislative immunity claim is rendered even more tenuous by the fact that the District Court's award runs not against the "legislators" but against the State of Virginia. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 59 L.Ed.2d 401 (1979), this Court noted that even if legislative immunity were to bar an action against individuals, an action would nevertheless lie against the agency itself. Lake Country Estates does not support even a claim of personal legislative immunity since, in the narrow context of a regional body governed solely by interstate compact, the Tahoe Commissioners performed as legislators, not administrators. Given the continued functioning of the Virginia legislature, one can hardly argue that the Supreme Court of Virginia is the sole legislative authority for Virginia. Quite the contrary, its power over the legal profession is an administrative one conferred by the Virginia legislature. Unless the exercise by an administrative agency of delegated rule-making power is to be treated as a legislative act (Cf. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)), the Virginia Court's rule-making process is not entitled to legislative immunity.

IV. CONGRESS INTENDED TO SUPERSEDE COMMON LAW IMMUNITIES IN ENACTING 42 U.S.C. §1988.

This Court has already held that Congress, in enacting 42 U.S.C. §1988, intended to override the constitutionally-based immunity enjoyed by states under the Eleventh Amendment. Hutto v. Finney, 437 U.S. 678 (1978). Where, as here, an award of fees pursuant to 42 U.S.C. §1988 will be paid by the state, Hutto is dispositive of any possible immunity issue.[23/] Even if one assumes, however, that awards payable by a state entity are governed by personal, as well as entity-immunity rules, Congress clearly intended to supersede judicial immunity to a grant of attorneys' fees in an appropriate case. First, given Hutto's holdings that Congress intended to override a constitutionally-based immunity, it is an a fortiori proposition that lesser

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23/ See generally, Point II, supra.

common law immunities were superseded as well.[24/] Second, Congress clearly expressed its intent to sweep away immunity-based restrictions on awards of fees in constitutional cases, by specifically referring to Pierson v. Ray, supra.

Thus, although amici have argued that an award of fees incident to a grant of prospective relief is not subject to doctrines of immunity; that awards of fees payable by the state do not implicate judicial immunity; and that appellants

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24/ Petitioners suggest that Congress lacks power to supersede the judicial immunity of state judges. However, common law personal immunities are nothing more than judge-made rules of self-restraint. This Court has consistently recognized that a legislature may modify or abolish common law immunities. E.g. Pierson v. Ray, 386 U.S. 547 (1967) (Congress did not intend to abolish judicial immunity by enacting 42 U.S.C. §1983); Tenney v. Brandhove, 341 U.S. 367 (1951) (Congress did intend to abolish legislative immunity by enacting 42 U.S.C. §1983). Appellants' suggestion that common law immunities are codified by the Tenth Amendment, or even more tenuously, by the Guarantee Clause, is wholly without precedential support.

were not engaged in "judicial" or "legislative" acts within the meaning of immunity doctrines, even if the District Court's order would, in the absence of 42 U.S.C. §1988, have been barred by a common law immunity, the clear intent of Congress has freed federal judges from the constraints of immunity doctrines in allocating the expenses of a successful application for prospective constitutional relief.

CONCLUSION

For the above-stated reasons, the order of the District Court should be affirmed.

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